

Supplemental Letter of Findings: 04-20190846
Gross Retail and Use Tax
For the Years 2012 through 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

HOLDING

The Department agreed that Audio Equipment Company met its burden of establishing that the Department's assessment of additional sales/use tax was overstated; Audio Equipment Company provided documentation verifying that it was assessed for otherwise exempt transactions such as labor charges and for transactions which took place entirely outside the state.

ISSUES

I. Gross Retail and Use Tax - Out-of-State Transactions.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Rhoads v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002).

Taxpayer argues it was not responsible for paying sales tax or self-assessing use tax on the purchase of items which were used by or at one of its out-of-state facilities.

II. Gross Retail and Use Tax - Exempt Services.

Authority: [45 IAC 2.2-4-2](#); [45 IAC 2.2-4-2\(a\)](#); IC § 6-8.1-5-1(c).

Taxpayer argues that the Department's audit erroneously assessed sales/use tax on Taxpayer's purchase of exempt services.

STATEMENT OF FACTS

Taxpayer is an Indiana company which manufactures, sells, and installs audio equipment. Taxpayer has a business relationship with out-of-state affiliates and conducts business activities both within and outside the United States. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's 2012 through 2015 business records, sales and purchase transactions, and tax returns.

Based on the substantial number of 2012 through 2015 Taxpayer records, the Department decided to prepare a "statistical sampling" of those records. Taxpayer agreed to the sampling methodology and signed form AD-10A ("Agreement for Projecting Audit Results") to that effect. That sample was used to calculate any additional tax liability.

The Department's audit resulted in assessments of additional sales/use tax. According to the Department's audit report, the assessments resulted from: (1) Taxpayer's failure to obtain "properly executed exemption certificates" from certain of its customers; (2) Taxpayer purchased taxable "computer hardware, canned software, and accessories" without paying sales tax; (3) Taxpayer purchased various taxable "promotional items" without paying tax; (4) Taxpayer purchased taxable "meals, banquets, and food and beverage" without paying sales tax; and (5) Taxpayer rented furniture without paying sales tax. In addition, the Department found that Taxpayer purchased various capital items such as light fixtures and other items without paying sales or use tax.

Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. A Letter of Findings was issued November 2019 sustaining Taxpayer's protest in part and denying it in part. Taxpayer disagreed with a portion of the November 2019 decision and requested a rehearing. The request was granted, a second hearing was conducted during which Taxpayer's representative explained the basis for the rehearing, and this Supplemental Letter of Findings results.

I. Gross Retail and Use Tax - Out-of-State Transactions.

DISCUSSION

Taxpayer states that it was assessed tax on transactions which occurred entirely outside Indiana. For example, Taxpayer explained that it was incorrectly assessed tax on transactions in which the buyer - one of its affiliates - was located outside Indiana and the seller was also located outside Indiana. According to Taxpayer, although it has a business relationship with the affiliate/buyer, neither it nor the named buyer are individually subject to Indiana's sale or use tax and that these transactions should be removed from the audit's "sample" on which the Department determined the challenged assessment.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting its challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit decision, are entitled to deference.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

In effect and practice, the use tax is functionally equivalent to the sales tax. See *Rhoades v. Ind. Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

As Taxpayer correctly notes, Indiana's sales tax is imposed on retail transactions which are "made in Indiana," IC § 6-2.5-2-1(a), while the complementary use tax is imposed on property used or consumed in Indiana regardless of where the property was originally purchased. IC § 6-2.5-3-2(a).

As to the following payments, Taxpayer *has met* its burden under IC § 6-8.1-5-1(c) of establishing that the transactions should not have been included in the audit sample.

- Document Number 190061934, Invoice 1674, dated August 5, 2015, Palais (Special Bus Limited);
- Document Number 316418, November 11, 2014, Harman/Becker Automotive;
- Document Number 1900048877, Invoice PS1783AR, dated November 4, 2013;
- Document Number 1900047455, Invoice 10247369, dated July 1, 2013;
- Document Number 1900032862, Invoice 4847, dated July 5, 2012;
- Document Number 1900053062, Invoice PS1783AR, dated November 4, 2013, Dassault Systemes SolidWorks Corp.

Taxpayer *has not met* its burden that the following transactions should have been excluded from the statistical sample.

- Document 1900047683, dated September 13, 2013, Harman International (\$100,809.28)

Taxpayer has not met its burden under IC § 6-8.1-5-1(c) of establishing that assessment of tax on this September 13, 2013 transaction was "wrong."

FINDING

As to the transactions designated in Part I above, Taxpayer's protest is sustained in part and denied in part.

II. Gross Retail and Use Tax - Exempt Services.

DISCUSSION

Taxpayer argues that it was incorrectly assessed sales/use tax on its purchase of exempt services.

As pointed in Part I above, it is the Taxpayer's responsibility to establish that the tax assessment is incorrect. IC § 6-8.1-5-1(c).

Taxpayer relies on [45 IAC 2.2-4-2](#) as authority for its position that these purchases are exempt from sales/use tax.

[45 IAC 2.2-4-2](#) provides as follows:

- (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
 - (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
 - (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
 - (3) The price charged for tangible personal property is inconsequential (not to exceed 10[percent]) compared with the service charge; and
 - (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.
- (b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.
- (c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.
- (d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

The regulation on which Taxpayer depends, [45 IAC 2.2-4-2](#), contains a provision exempting the purchase of services from sales tax. [45 IAC 2.2-4-2\(a\)](#) states that, "Professional services, personal services, and services in respect to property not owned by the person rendering such services are not transactions of a retail merchant constituting selling at retail, and are not subject to gross retail tax." However, "Where, in conjunction with rendering professional services . . . the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail . . ." *Id.*

As to the following payment, Taxpayer has provided documentation which is sufficient to meet its burden of establishing that the transaction was one for which Taxpayer was purchasing and paying for exempt labor services.

- Document number 1900048877, November 4, 2013, Manpower

Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that assessment of tax on this transaction was "wrong."

FINDING

As to the transaction designated in Part II above, Taxpayer's protest is sustained.

SUMMARY

Taxpayer's protest is sustained in part and denied in part. As set out in the Letter of Findings, the Department incorrectly assessed sales/use tax on specific transactions which should be removed from the audit sample relied upon to calculate Taxpayer's sales/use tax assessment.

August 21, 2019

Posted: 10/30/2019 by Legislative Services Agency

An [html](#) version of this document.